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THE

DECREE

OF THE

BARONS of the EXCHEQUER,

Delivered by Sir JAMES EYRE, Nov. 17, 1777,

IN THE

GREAT CAUSE OF TYTHE MILK,

BETWEEN THE

Rev. Dr. BOSWORTH, LIMBRICK, and OTHERS,

As taken in Short-Hand, by Mr. GURNEY.

With an APPENDIX from the ſame DECREE,

RESPECTING THE PAYMENT OF

AGISTMENT TYTHES for CATTLE

Kept in one PARISH, and uſed in ANOTHER,

And the Manner of Tything POTATOES and APPLES.

TO WHICH IS ADDED,

The FORM of a NOTICE,

Proper to be delivered to the Payers of Tythe Milk in Kind.

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MDCCLXXIX.

The following important Determination of the Court of Exchequer is publiſhed in the Hope that it may be equally ſerviceable to the Clergy and Laity.

The DECREE, &c.

THE Bill which was filed in the Court of Exchequer by the Rev. Dr. Boſworth, Rector of Tortworth, in Gloceſterſhire, complained that he had been defrauded of one Third of his Tythe-Milk by the ſetting forth the Tythe on an Evening, and never on a Morning; under a Plea that the Tenth Meal was aſſigned the Parſon by Law; on which the Court obſerved, that "The Defendants pro-
"feſs that they have duly ſet out to the
"Plaintiff, for his Tythe, every Fifth
"Evening's Meal; which, *they ſay*, is
"the Tenth Meal to which the Parſon
"is entitled. They having brought
"their Cows to the Pail in the Morn-
"ing, and beginning to count from
"the Morning of that Day to the Even-
"ing, and ſo on, the Fifth Evening's
"Meal of Milk makes the Tenth Meal,
"which is the Parſon's Due.

" The Plaintiff contends, that the ſet-
" ting out every Fifth Evening's Meal
" is not the due Mode of Tything:
" And the Argument for the Plaintiff
" aſſumes one Fact; which is, that the
" Produce of the Evening's Meal from
" phyſical, as well as other Cauſes,
" muſt always be *leſs* in *Quantity* than
" the Morning's Meal. And the Wit-
" neſſes on both Sides agree, that the
" Fact is ſo, though they differ a great
" Deal as to the Proportion.

" One of the Plaintiff's Witneſſes
" made a great Number of Experiments,
" in order to aſcertain the Proportion
" in which the Evening's Meal fell
" ſhort; and it appeared, upon the Re-
" ſult of theſe Experiments, that it
" *frequently* fell ſhort a Third, but *never*
" leſs that a Fourth Part of the Morn-
" ing's. It therefore follows, as a neceſ-
" ſary Conſequence, that a Fifth Even-
" ing's Meal conſtantly ſet out to the
" Parſon, muſt produce him leſs, upon
" the whole, than a Tenth Part of the
" Milk.

" This being the Fact, the Argument
" proceeds thus:—The Tythe of Milk

" (as of all other tythable Matters) be-
" longing *de jure* to the Parſon, is the
" Tenth Part of the Milk produced.
" A Rule of Tything, therefore, which
" *neceſſarily* gives to the Parſon leſs than
" the Tenth, cannot be the true Rule.

" This was the Sum of the Argu-
" ment urged for the Plaintiff. It was
" admitted, that it had been thus far
" ſettled, by the *few* Caſes that are to
" be found on the Subject of Tythe
" Milk, that *neither the Tenth Part of*
" *every Cow's Milk at every Meal, nor the*
" *Tenth Part of the whole Meal, were to*
" *be ſet out to the Parſon*, and that *the*
" *Tenth Meal was the Tythe to be ſet out*
" But for the Plaintiff they inſiſted that
" the Tenth Meal muſt not be ſo com-
" puted as *neceſſarily* to produce leſs
" than a Tenth Part of the whole Ten
" Meals taken together.

" The Plaintiff's Counſel endea-
" voured to point out a Manner of
" taking the Tenth Meal, which would
" not be liable to this Objection. They
" ſuggeſted taking *a Morning and Even-*
" *ing's Meal alternately*, or taking *the*
" *whole Meal of the Tenth Day.*

" The

" The Defendant's Counſel ſay, that " in the Caſe of taking it the whole " Day, it would be taking the Nine- " teenth and Twentieth Meals, inſtead " of every Tenth; and in the other " Caſe, that it would be taking ſome- " times the Ninth, and ſometimes the " Eleventh Meal; and therefore, that " in either Caſe, it would be depart- " ing from the Rule laid down, which " is, that *the Parſon is entitled to the* " *Tenth Meal.* This they inſiſt is now " to be taken as a clear Rule of Law; " ſettled by the Authority of ſeveral " Determinations, and become an eſta- " bliſhed Rule of Property.

" Upon general Principles, we find " it difficult to perſuade ourſelves that " that can be a true Rule of Tything, " which puts it in the Power of the " Farmer to give the Parſon, perhaps, " a Twelfth, a Thirteenth, or a Four- " teenth, inſtead of a Tenth. A Pre- " ſcription to pay leſs than a Tenth, " we all know, would be a void Pre- " ſcription, unleſs it was aſſiſted by " ſome Conſideration to make the Par- " ſon amends for the Difference be- " tween the Tenth and that leſs, which

" the

" the Preſcription propoſed to give
" him. When the Tenth Meal was
" declared to be the Right of the Par-
" ſon, it was certainly ſubſtituted in
" the Place of the Tenth Quart, or the
" Tenth Diſh, or the Tenth Part of
" each Meal: It was not meant to give
" leſs than the Tenth, but the Object
" was to give the Tenth in a more
" convenient and more uſeful Form.
" It was therefore auxiliary to the ge-
" neral Right of a Tenth: it was in-
" tended to fortify and not to deſtroy
" that Right. If, in experience, it
" turns out to be ſo unhappily framed,
" as to be capable of being made to
" operate in Deſtruction of a Right,
" (as it certainly would do in the Senſe
" in which it is underſtood by the De-
" fendants) it ſhould ſeem that, not-
" withſtanding the Authority of Caſes,
" the Right would be ſuppoſed, and
" the Rule condemned, as not war-
" ranted by the Law of England, and
" as being fundamentally erroneous in
" the original Conception of it; and
" the overturning ſuch Caſes would be
" no great Stretch of Authority; in
" Truth, it would be *reſtoring*, not
" *altering*, the Law.

" But

" But we are very ready to admit, " that we ought not haſtily to condemn " a Rule laid down upon great De- " bate, and Conſideration of ſeveral " different Modes of Tything, prac- " tiſed, at different Times, in different " Places. We ought rather to ſuſpect " that we have not underſtood the true " Senſe and Meaning of the Rule.— " Unqueſtionably, if a Conſtruction " can be put upon this Rule of Tyth- " ing, which will preſerve the original " Spirit of it, it's Truth and it's Juſ- " tice; and put it out of the Power of " any Man to make it an Inſtrument " of Wrong and Injuſtice, this Court " will ſtrongly incline to adopt ſuch a " Conſtruction. And upon Conſidera- " tion, we think ſuch a Conſtruction " may be put.

" The Morning and Evening Meals, " being neceſſarily unequal in Pro- " duce, may, and we think ought to " be, conſidered as diſtinct tythable " Matters, from each of which you " may count on to the Tenth, which " will be the Right of the Parſon; and " that Tenth will be the Tenth Meal " *of that Deſcription to which it belongs,* " either

" either Morning or Evening; and in " this Way the Parſon will, upon the " whole, have his full Tenth, as much " as he can have in the Manner of col- " lecting any other Species of Tythes " whatever; inſtead of neceſſarily tak- " ing leſs than a Tenth in the Defend- " ant's Way of ſetting out his Tythes. " And, in Reſpect to Authority, upon " a careful Review of all the Caſes, * " we have been able to find upon this " Subject; we not only do not find " any adjudged Caſes ſtanding in our " Way, but we collect that the Rule " of the Tenth Meal was originally un- " derſtood in the Senſe in which we " think it ought now to be underſtood.

" There appears therefore to us no- " thing, in Point of Argument or " Authority, which ſhould prevent us " from effecting the Juſtice of the Caſe " between theſe Parties, by declaring " that *the Defendants ought to have paid*

* The Caſes quoted were: — " WEST TYTHERY, SIL- " VERLOCK, and EYLES.—CHIGWELL, DOD, and INGLE- " TON. — HILL and VAUX.—Lord RAYMOND, 1ſt Vol. of " Reports.—BURTON, EKINS, and BRIDEN, 1703.—BRINK- " LOW and EDMONDS, 1731."

" *to the Plaintiff the Tenth Morning's*
" *Meal, and the Tenth Evening's Meal,*
" of this Milk; in which, having
" failed, they will be decreed to ac-
" count.

" That we may be perfectly under-
" ſtood, I add, that it is by accident
" that it happens in this particular Caſe
" that the Tythe, which ought to have
" been paid, would be the whole Milk
" of one Day.

" If the Cows had been begun to be
" milked in the Evening, inſtead of
" the Morning, the Meal would have
" been due in the Evening, and in the
" Morning of the ſucceeding Day;
" and that would have been the Jewiſh
" Day which we heard of in this
" Cauſe.

" The Coſts in this Part of the Cauſe
" remain to be conſidered. Hitherto
" we have choſen to conſider this Caſe
" very much in the Abſtract, for the
" Sake of the dry Point; detached
" from every Circumſtance of Fact, the
" ſingle Fact of Inequality in the Morn-
" ing's and Evening's Milk only ex-
cepted;

" cepted; upon which the whole
" ariſes. But, upon the Queſtion of
" Coſts, the Hiſtory of the Cauſe, and
" the general Complexion of it, be-
" comes material. I think both may
" be collected from the Evidence of
" Mr. T—— M——; who has told us,
" that he entered into Engagements
" with a noble Lord, to adviſe his
" Tenants, and to aſſiſt them in ſetting
" out their Tythes; no Tythes having
" been ſet out for Fifty-five Years pre-
" ceding that under his Directions, on
" the 21ſt of April, 1772; that the
" Defendant Cullimore, and eight o-
" thers, delivered a Notice in writing
" to the Plaintiff, that they would ſet
" out their Tythe Milk every fifth Day
" in the Afternoon, and that the next
" Meal would be due on the 25th Day
" of April next; and the Milk was ac-
" cordingly ſet out every fifth Even-
" ing.

" The Purpoſe of ſetting out the
" Tythe in the Evening, and of ſo
" many different Perſons ſetting out
" their Tythes on the ſame Evening,
" is too obvious to be miſtaken. Mr.
" M—— gravely tells us, that he was

" ordered to charge the Tenants to
" play no Tricks. Taking Advantage
" of what he underſtood to be the Let-
" ter of the Law to injure the Parſon
" materially in his Right, as well as to
" diſtreſs him, as much as poſſible, in
" the Exerciſe of that Right, I ſuppoſe
" this Gentleman thought was no Trick.
" But we are of Opinion that this was
" a Trick; diſgraceful to the Adviſer
" of it, and reflecting no Honour upon
" any one of the Parties concerned in,
" or conſenting to it. — Dr. Boſworth
" feeling himſelf aggrieved by theſe
" Manuœvres of Mr. M——, has taken
" upon him to controvert Mr. M——'s
" Law, and he has ſucceeded under
" ſuch Circumſtances, that (though the
" Point of Law might have been thought
" ſufficiently diſputable, *if it had been*
" *fairly conteſted*, to have excuſed the
" Party failing from paying the Coſts of
" Suit) we are of Opinion the Coſts
" ought to follow the Right.

" The Defendants are therefore to
" account for the Tythe of Milk, *with*
" *Coſts.*"

APPENDIX.

APPENDIX.

DOCTOR BOSWORTH's Bill complained likewiſe that the Tythe of Potatoes and Apples was unfairly ſet out; the Farmer leaving a Tenth Buſhel or Sack on the Spot where they aroſe for the Parſon, and carrying Home nine Buſhels or Sacks only; *as he alledged*; and ſometimes carrying all Home, and ſending to the Parſon, ſome Days after, for Somebody to come and tythe them.—On which the Court obſerved, that "This is certainly no due ſetting out "of this Species of Tythes: for that "the Parſon has a Right to inſiſt that "*his Tenth Part ſhould be ſeparated from* "*the nine Parts upon the Spot where* "*they ariſe, and before they are re-*"*moved.**

"The

* The Reaſon for this equitable Deciſion ſeems to be, that the Parſon, or his Agent. may have Time to view and compare the Tenth with the other nine Parts.

" The Plaintiff profeſſes to have no " View in praying an Account of theſe " Species of Tythes, but to aſcertain " the Manner of tything for the future, " he will therefore be content with the " Declaration that the Court decrees " that he is entitled to an Account."

An Account was alſo decreed for Tythe Hay left on the Farmer's Ground, he having driven the Plaintiff's Servants out of the Field, on a Pretence that they had no Right to be there but when his People were there alſo.

On which it was decreed, " That " the Parſon may take away his Tenth " Part as ſoon as ſet out, if he pleaſes; " or he may leave it a reaſonable " Time,* (of which the Law conſtitutes " a Jury the Judges) but then it is at " his own Riſque, if ſtolen or injured, " unleſs the Privity of the Farmer be " proved; in which Caſe they may be " recovered of the Farmer."

A Queſ-

* If the Tythes remain on a Farmer's Land longer than is reaſonable, the Farmer cannot ſue till three Days after he has given Notice that the Tythes are ſet out, and they continue unremoved; nor can he *legally* let his Cattle go where the Tythe is.

A Queſtion likewiſe aroſe in this Cauſe, whether Cattle kept in the Plaintiff's Pariſh, and uſed by the Defendant in another Pariſh, ſhould pay *Agiſtment* Tythe. On which the Court obſerved, that, " If it were proper to determine " this Queſtion now, they need only " refere to the Caſe of Scoles and " Lowther, which is in Point *that they* " *ſhould pay*:* And the Reaſon is ob- " vious; for the Cattle being depaſtur- " ed in the ſame Pariſh where they " work, the Effect of their Labour is a " Satisfaction for the Tythe of their " Paſture, if they worked in another " Pariſh, there could be no Satisfaction, " and the Parſon muſt have an Agiſt- " ment Tythe, or he will have no " Tythe."

* Firſt Volume of Lord Raymond's Reports.

FORM

FORM of a NOTICE

TO BE DELIVERED TO THE

PAYERS of TYTHE MILK in KIND.

THE Court of Exchequer having decreed, in the Cauſe Boſworth againſt Limbrick and others, that the Tythe of Milk ought to be paid by ſetting out, as Tythe, the whole Meal of Milk on every Tenth Morning, and the whole Meal of Milk on every Tenth Evening, I hereby give you Notice to ſet out the Tythe of Milk ariſing on the Lands you occupy within the Pariſh of ———, conformably to that Decree; computing the firſt Tenth Morning's Meal, and the Tenth Evening's Meal, where your firſt Tythe Meals of Milk ought to be ſet out, from the firſt milking Time which ſhall happen after your receiving this Notice.

FINIS.